No. 83-128

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA,
Petitioner,

v.

WILLIAM GOUVEIA, *et al.*,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF RESPONDENT ROBERT RAMIREZ

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QUESTIONS PRESENTED

1. Whether, under any circumstances, a federal prisoner, suspected of committing a crime while in prison and placed in administrative detention, is constitutionally entitled to an attorney prior to indictment?

2. Whether dismissal of the indictment is the appropriate remedy where an indigent federal prisoner is held in solitary confinement for 19 months as a suspect in a murder investigation and his requests for appointed counsel are denied until he is formally indicted 20 months after the alleged crime?

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BRIEF OF RESPONDENT ROBERT RAMIREZ

OPINION BELOW

The Opinion of the United States Court of Appeals for the Ninth Circuit is reported at 704 F.2d 1116 (9th Cir. 1983).

JURISDICTION

The judgment of the Court of Appeals was entered on April 26, 1983. The petition for writ of certiorari was filed by the Government on July 25, 1983 and was granted on October 17, 1983. The jurisdiction of the Court rests on 28 U.S.C., section 1254(l).

CONSTITUTIONAL PROVISION

The Sixth Amendment provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.

STATEMENT

On November 11, 1978, Thomas Trejo, an inmate at the Federal Correctional Institute at Lompoc, California, was stabbed to death. Mr. Trejo received 43 stab wounds to the heart. There were no eyewitnesses to the crime. (2 R. 147-150) The autopsy surgeon placed the time of death between noon and 1:00 p.m. (2 R. 160) The body was discovered at 3:20 p.m. by Armando Macias, an inmate who was assigned to the cell in M-Unit where the killing occurred. (5 R. 818-831) Also, at approximately 3:20 p.m., a correctional officer discovered four knives wrapped in blood-stained toilet paper, lying on the floor of the second floor latrine in E-Unit. (6 R. 1191-1193)

Within hours of the killing, both Bureau of Prisons and the Federal Bureau of Investigation began their in-

vestigations to discover the perpetrators of the crime. (J.A. 50) Beginning on November 11, 1978, the F.B.I. interviewed over 100 witnesses. Many of these witnesses were interviewed more than once. (J.A. 50)

The Respondents in this case, Adolpho Reynoso, Robert Ramirez, William Gouveia and Philip Segura, and two additional co-defendants, Pedro Flores and Steven Kinard, were all sentenced federal prisoners. On the day of Thomas Trejo's death, they were all serving their sentences at the Federal Correctional Institution at Lompoc, California.

On the evening of November 11, 1978, three of the defendants who were later indicted in this case, Adolpho Reynoso, Pedro Flores and William Gouveia, were placed in solitary confinement in the Administrative Detention Unit (ADU). This decision was made by Federal Correctional Institution officials, who suspected that the murderers of Thomas Trejo were members of the "Mexican Mafia." All persons suspected of being members of this prison gang were immediately placed in the Administrative Detention Unit. This included Reynoso, Flores and Gouveia. (J.A. 50)

On November 22, 1978, Reynoso, Flores and Gouveia were released from the Administrative Detention Unit and returned to the general prison population. On December 4, 1978, the prison officials placed Adolpho Reynoso, Pedro Flores, William Gouveia, Robert Ramirez, Philip Segura and Steven Kinard into the Administrative Detention Unit. (J.A. 50)

As early as November 29, 1978, as a result of an interview with a prison inmate, the F.B.I. had identified Reynoso, Ramirez, Flores, Gouveia, Segura and Kinard as the possible murderers of Thomas Trejo. On Novem-

ber 29, 1978, the United States Attorney's Office in Los Angeles, California, opened a file with the aim of eventually prosecuting those six individuals for the murder of Thomas Trejo. This occurred at the request of F.B.I. agent James R. Wilkins, the agent in charge of the investigation of the Trejo murder. (J.A. 50-51)

However, these six individuals, including the Respondent Robert Ramirez, were not indicted for the murder of Thomas Trejo until June 17, 1980. The first time that the defendants were brought into court for an arraignment was on July 14, 1980. In the case of Robert Ramirez, he remained in solitary confinement in the Administrative Detention Unit as a suspect in the murder of Thomas Trejo for twenty months before being brought to court to face criminal charges alleging that he was one of the murderers of Thomas Trejo.

During the F.B.I.'s investigation of the case, Robert Ramirez was interrogated by the F.B.I. on three occasions. He was questioned twice in November of 1978 and once on December 4, 1978. On the December 4, 1978 occasion, Robert Ramirez requested that an attorney be provided to assist him. At that time, no attorney was provided. (J.A. 32, 37)

The Bureau of Prisons instituted an administrative investigation and on December 13, 1978, the Unit Disciplinary Committee and the Institutional Disciplinary Committee at the Federal Correctional Institution at Lompoc conducted administrative hearings to consider Robert Ramirez' involvement in the killing. At the hearings, Robert Ramirez again requested that an attorney be provided for him. This request was repeatedly denied. The prison officials found at these administrative hearings that Robert Ramirez was guilty of murdering Thomas Trejo and Mr. Ramirez was placed in solitary confine-

ment in the Administrative Detention Unit.[1] His confinement in the Administrative Detention Unit continued until after his indictment for murder in the United States District Court.

Robert Ramirez remained in the Administrative Detention Unit at the Federal Correctional Institution at Lompoc continuously for a period of more than 19 months. While in the Administrative Detention Unit, Robert Ramirez was confined to his individual cell except for a 30 minute exercise and shower period every day. He was denied access to the general population and his participation in various prison programs was curtailed. He had access to legal materials, he had visitation rights, and he had some access to a telephone on a very limited basis. During this period, no attorney was appointed to represent Mr. Ramirez and since he was indigent, he was unable to hire his own attorney. (Pet. App. 2a-3a)

On June 17, 1980, a grand jury indictment was filed against Adolpho Reynoso, Robert Ramirez, William Gouveia, Pedro Flores, Philip Segura and Steven Kinard. All six individuals were accused of the crimes of conspiracy to commit murder in violation of 18 U.S.C., section 1117, and the murder of Thomas Trejo at the Federal

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[1] The United States Department of Justice Bureau of Prisons Incident Report dated December 13, 1978, which was prepared at the time of the prison administrative hearing which inquired into the involvement of Robert Ramirez in the killing of Thomas Trejo reads:

> Based on confidential information and inmate interviews, you did on 11 Nov 78, participate in the fatal stabbing of inmate TREJO, THOMAS A., Reg. No. 35025-136. This murder took place in M Unit at approximately 12:30 p.m., you were assisted by not less than six other inmates, of which two others along with you did also stab the victim. (Ramirez Excerpt of Record in Court of Appeals p. 26)

Correctional Institution at Lompoc, California in violation of 18 U.S.C., section 1111. (J.A. 4)

On July 14, 1980, over 21 months since the death of Thomas Trejo, Robert Ramirez was brought to court for the first time to answer the charge of murdering Thomas Trejo. On that date, counsel was appointed to represent Mr. Ramirez and a plea of not guilty was entered.[2]

Prior to trial, Robert Ramirez and all of the co-defendants moved for a dismissal of the indictment for violations of their right to due process under the Fifth Amendment and for violations of their right to a speedy trial and to the assistance of counsel under the Sixth Amendment. Because of the delay on the part of the Government in bringing the indictment, almost two years had elapsed before the case would be brought to trial. Because of the long delay in bringing formal charges against Robert Ramirez and the other defendants and the delay in providing them with counsel, the attorneys ultimately appointed to represent them were forced to

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[2] On September 20, 1979, Robert Ramirez was called as a witness before the grand jury investigating the murder of Thomas Trejo. Counsel was appointed prior to his testimony on that date for the limited purpose of advising Mr. Ramirez of his rights as they related to his testimony before the grand jury. When he appeared before the grand jury, Robert Ramirez agreed to furnish fingerprint exemplars, but declined to make any statement concerning the death of Thomas Trejo. (Ramirez' Excerpt of Record in Court of Appeals. p. 28-29)

Obviously, counsel must have advised Mr. Ramirez that the Fifth Amendment allowed him to refuse to make a statement before the grand jury but that a request to provide fingerprint exemplars could not be refused on Fifth Amendment grounds because fingerprint exemplars are non-testimonial evidence. See, *Schmerber* v. *California*, 384 U.S. 757 (1966); *United States* v. *Wade*, 388 U.S. 218 (1967); *United States* v. *Dionisio*, 410 U.S. 1 (1973).

conduct an investigation into the case almost two years after the death had occurred. (J.A. 78-93)

In support of the motion, Robert Ramirez alleged that witnesses were difficult to locate and memories of the events of November 11, 1978 had begun to fade. Several witnesses listed in Ramirez' "notice of alibi" did not appear and testify at trial because they could not be located. In essence, while the Government was able to begin their investigation on the very day of the murder and continue that investigation for two years, Robert Ramirez and the other defendants were deprived of the opportunity to conduct a fresh investigation while the memories of witnesses were still clear, and while those witnesses could still be found. (J.A. 32-34, 78-93)

Noting that it was "unfortunate that there has been the delay that has ensued in this prosecution," the trial judge denied the motion to dismiss the indictment. On the right to counsel ground, the trial judge stated that "the right to counsel did not adhere or did not arise, and did not arise until the appropriate time after the indictment." (J.A. 92-93)

The first trial commenced on September 16, 1980. The jury was unable to reach a verdict in the case of the four Respondents Reynoso, Ramirez, Segura and Gouveia, and a mistrial was declared. However, Pedro Flores was acquitted by the jury in the first trial. Steven Kinard, also charged in the indictment, entered into a plea bargain prior to the first trial and became a Government witness against the remaining defendants.[3]

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[3] Steven Kinard was the only Government witness to directly involve Robert Ramirez in the conspiracy and murder of Thomas Trejo. Although Steven Kinard was originally charged with conspiracy to murder Thomas Trejo, the murder of Thomas Trejo, and

A second trial began on February 17, 1981. At the conclusion of this trial, all four Respondents were convicted of both conspiracy and murder. Each was sentenced to consecutive life and ninety-nine year terms of imprisonment.

The primary Government witness against Robert Ramirez at the trial was Steven Kinard. There was no physical evidence connecting Mr. Ramirez to the commission of the crime.[4] Steven Kinard testified that shortly after the arrival of Thomas Trejo at the Lompoc prison in November of 1978, he had a conversation in the yard with Adolpho Reynoso and Philip Segura. At that time, Adolpho Reynoso stated that Trejo had made a bad move against "la cliqua" and he had to be "sent home by Christmas." Kinard understood this to mean that Trejo was to be murdered. (3 R. 484-489)

Kinard testified that during this same first week in November of 1978, he had a conversation with Robert Ramirez. According to Kinard, Ramirez stated that he

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conveying a knife in prison, Kinard entered into a plea agreement with the Government. Pursuant to the agreement, Kinard pleaded guilty to conveying a weapon in a federal correctional institution and testified at the trial as a Government witness. In exchange, the Government agreed to dismiss the murder and conspiracy charges. (4 R. 477-478, 508) What actually occurred, however, was that after all of the Respondents were convicted, Kinard was permitted to withdraw his guilty plea and all charges were dropped. (14 R. 3093)

[4] A piece of writing paper was found on top of the locker in the cell where the body was found. The paper contained one latent fingerprint and two latent palmprints. The fingerprint was that of William Gouveia. One of the palmprints belonged to William Gouveia and the other palmprint belonged to Philip Segura. (3 R. 440-445) A bloody shoeprint found on a locker door in the cell corresponded in size and design with the shoe of Philip Segura. (3 R. 404-415, 397-399)

had procured knives from a black inmate in the welding shop in exchange for marijuana. On the following day, Kinard observed Robert Ramirez receive the knives from an inmate in the welding shop. Ramirez then told Kinard that he would give the knives to an inmate, named Gano, to smuggle into the main institution building. That same day, Robert Ramirez handed two knives to Gano[5] through the shop window. (3 R. 490-494)

According to Kinard, two days later, Robert Ramirez told Steven Kinard to pick up a knife from inmate Stinky Manuri.[6] Kinard met Manuri at the recreation yard where Manuri handed Kinard a knife. Kinard put the knife in his pocket and carried it into the institution building. Kinard gave the knife to Robert Ramirez who, in turn, hid the knife in the trash, stating that another inmate would pick it up. (3 R. 494-501)

On November 11, 1978, Steven Kinard went to the recreation yard after brunch at about 11:00 a.m. Kinard testified that he joined a group of inmates including Reynoso, Ramirez, Segura, Gouveia, Palacios and Recendez. At that time, Adolpho Reynoso stated that "the fool had to be sent home today." The group then walked the track and when it started to rain, they entered the gym. Inside of the gym corridor, Reynoso and Ramirez discussed where Trejo should be killed. After considering several locations, Reynoso finally decided that it should occur in M Unit. (3 R. 509-515)

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[5] James Gano testified that he was at Lompoc in November of 1978. He denied ever receiving knives from Robert Ramirez. (9 R. 1793-1797)

[6] Peter Manuri, also known as "Stinky," testified that he was an inmate at Lompoc in November of 1978. Mr. Manuri denied ever giving Steven Kinard a knife while at Lompoc. (11 R. 2419-2426)

Steven Kinard testified that Reynoso told Robert Ramirez to bring Thomas Trejo to M Unit since Ramirez had been a friend of Trejo's in the past. The group then broke up with some members leaving to change clothes and others leaving to obtain the knives. (3 R. 515-521)

The entire group once again reassembled in the gym. It was there that Reynoso directed Ramirez to find Trejo. (3 R.T. 322) Kinard testified that Reynoso directed Kinard to go to his cell and wait. As Kinard was leaving, he saw Reynoso, Segura, Gouveia, Palacios and Recendez walking toward M Unit. Steven Kinard then went to his cell in K Unit. (4 R. 531-534)

After fifteen or twenty minutes, William Gouveia called Steven Kinard and told him to meet with Tony Palacios[7] and get the knives. Kinard testified that he met Tony Palacios in front of K Unit and exchanged jackets with him. The knives were inside of Tony Palacios' jacket. Kinard took the knives to his cell, cleaned them and wrapped them in tissue paper. William Gouveia and Willard Taylor[8] entered Kinard's cell. Kinard gave the knives to Willard Taylor. After discussing where the knives could be disposed of, it was decided that Taylor would leave them in E Unit. (4 R. 532-545)

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[7] Antonio Palacios was an inmate at Lompoc in November of 1978. Mr. Palacios testified that he never met Steven Kinard at Lompoc. He also denied ever exchanging jackets with anyone between noon and 1:00 p.m. on November 11, 1978 in front of K Unit. (8 R. 1623-1631)

[8] Willard Taylor, known as "B.T.," testified that on November 11, 1978, Steven Kinard called Taylor into his cell and asked Taylor to help him get rid of some bloody knives. Gouveia, who was also present in Kinard's cell, likewise asked Taylor to help them get rid of the knives. (5 R. 870-880)

Steven Kinard testified that he thereafter went to the gym where he met Reynoso, Ramirez, Segura, Palacios, Recendez and Gouveia. According to Kinard's testimony, Kinard asked Adolpho Reynoso if it had gone well. Reynoso replied that "the fool's gone" and that he was "home by Christmas." Reynoso also stated that when he got "him" in a choke hold, that was when the brothers started working on "him." Reynoso then suggested that everyone go to a movie and the group left the gym. (4 R. 545-561)[9]

In the defense case, the Respondents Robert Ramirez (11 R. 2233-2247), Philip Segura (10 R. 2136-2159), and William Gouveia (11 R. 2362-2381) all denied participating in the murder and conspiracy. Each testified and presented evidence that they were elsewhere at the time of the murder. Robert Ramirez testified that he was in the gymnasium at the time of the killing. In addition to his own testimony, three inmates also testified that they observed Mr. Ramirez in the gymnasium between noon and 1:00 p.m. on the day of the killing. (7 R. 1323-1335,

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[9] The Government also offered testimony from other inmate witnesses. Edward Chaparro testified that Reynoso stated that he would kill again if the only thing that would happen to him was the loss of good time sentence credits. (6 R. 1209-1222) Richard Villalobos testified that he observed Pedro Flores pass a knife to Robert Ramirez in the main corridor on the night before the killing. (2 R. 189-192) Gene Newby testified that he observed the four Respondents and Pedro Flores enter the unit across the hall from where the body was found shortly after brunch on November 11, 1978. Reynoso and Segura were then observed tearing some clothing and flushing it down the toilet. (6 R. 1007-1017)

In the defense case, Pedro Flores testified that he was an inmate at Lompoc in November of 1978. Mr. Flores denied passing a knife to either Robert Ramirez or Adolpho Reynoso on the evening of November 10, 1978. (7 R. 1414, 1437)

1356-1365; 9 R. 1937-1952). Two inmates testified that Steven Kinard had told them that he killed Thomas Trejo, while assisted by another inmate named Michael Thompson. (10 R. 2061-2066, 2209-2212)

After the four Respondents were convicted, they appealed their convictions to the United States Court of Appeals for the Ninth Circuit. The Court of Appeals, in an en banc decision, voted six to five to reverse the convictions of all four Respondents. The Court also ordered the indictment to be dismissed.

The Ninth Circuit held that lengthy pre-indictment isolation without the assistance of counsel irrevocably prejudiced the ability of the Respondents to prepare an effective defense, and, thus, unconstitutionally deprived them of their Sixth Amendment right to counsel and to a fair trial. *United States* v. *Gouveia*, 704 F.2d 1116, 1119 (9th Cir. 1983). Since the Government's conduct in this case resulted in harm which was not capable of after-the-fact remedy, the Ninth Circuit ruled that the Respondents were in a position similar to suspects who were denied a speedy trial, and thus dismissal of the indictment was the only certain remedy. *United States* v. *Gouveia*, *supra*, at 1125-1127.

SUMMARY OF THE ARGUMENT

1. The Sixth Amendment right to counsel attached prior to the indictment of the Respondent because of the unique facts of this case. The Respondent was a federal prisoner. He was placed in solitary confinement for 20 months as a suspect in a prison murder prior to being indicted for that murder. Three weeks after being placed in solitary confinement, he was told at a prison disciplinary hearing that he was considered to be guilty of murdering another inmate. Since he was indigent, Respondent

requested that counsel be provided for him. No counsel was provided, however, until 20 months later when Respondent appeared in court to be arraigned on the murder charge.

The unfairness that resulted was that the Government, through the FBI, was able to begin their investigation and preparation of the case from the very day of the murder. Respondent, on the other hand, without counsel and placed in solitary confinement, was prevented from beginning his investigation and defense preparation until almost two years later when counsel was appointed. By then, inmate defense witnesses had been transferred, released and some were deceased. The net effect was that Respondent was unable to present the testimony of several defense witnesses who were now dead or missing, and those defense witnesses who were available had difficulty recalling the events which had occurred approximately two years before.

Although *Kirby* v. *Illinois*, 406 U.S. 682 (1972) limits the right to counsel to after the initiation of the adversary judicial proceeding, the *Kirby* case was factually different from Respondent's case. *Kirby* was not a prison case. This Court's decision in *United States* v. *Wade*, 388 U.S. 218 (1967) held that the right to counsel guarantee applies to critical stages of the proceedings, or, in other words, when counsel's presence is necessary to preserve the defendant's right to meaningfully cross-examine the witnesses against him and to have the effective assistance of counsel at the trial itself. See also, *Escobedo* v. *Illinois*, 378 U.S. 478 (1964); *Powell* v. *Alabama*, 287 U.S. 45 (1932). In Respondent's case, the right to counsel did attach prior to indictment in light of this Court's *Wade* decision.

2. The dismissal of a criminal indictment is an appropriate remedy for a violation of an accused's right to counsel upon a showing of "demonstrable prejudice, or substantial threat thereof." *United States* v. *Morrison*, 449 U.S. 361, 365 (1981). In this case, the Respondent has made a showing of demonstrable prejudice warranting the dismissal remedy.

The Ninth Circuit also found that there was a preumption of prejudice in this case from the Government's interference with the Respondent's right to the effective assistance of counsel, because there was a substantial threat of prejudice inherent in the facts of this case. Such a conclusion was consistent with numerous cases decided by this Court in which the particular right to counsel violation was deemed to be prejudicial per se. This has occurred in the past when no counsel has been provided, *Gideon* v. *Wainwright*, 372 U.S. 335 (1963); *Hamilton* v. *Alabama*, 368 U.S. 55 (1961), or when counsel is prevented from discharging functions vital to effective representation of his client. *Geders* v. *United States*, 425 U.S. 80 (1976); *Herring* v. *New York*, 422 U.S. 853 (1975).

ARGUMENT

I

A Federal Prisoner, Suspected Of Committing A Crime While In Prison And Placed In Administrative Detention, Has A Sixth Amendment Right To Counsel

The Sixth Amendment provides that, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." The right to counsel clearly applies to the representation in court by an attorney of a person accused of a felony. *Gideon* v. *Wainwright*, 372 U.S. 335 (1963); *Johnson* v. *Zerbst*, 304 U.S. 458 (1938). In *Powell* v. *Alabama*, 287 U.S. 45

(1932), this Court stated that the right to counsel at trial was one of those certain "immutable principles of justice which inheres in the very idea of a free government," and that it is one of the "fundamental principles of liberty and justice." (287 U.S., 67-69)

In numerous decisions of this Court, it has been made clear that in a felony criminal case, the right to counsel is not limited to the trial alone. A defendant is entitled to the right to counsel at the arraignment. *White* v. *Maryland*, 373 U.S. 59 (1963); *Hamilton* v. *Alabama*, 368 U.S. 52 (1961). He is entitled to have counsel assist in the preparation of the defense during that period of time between the arraignment and the trial. *Powell* v. *Alabama*, 287 U.S. 45 (1932). The right to counsel also exists at the preliminary hearing (*Coleman* v. *Alabama*, 399 U.S. 1 (1970)), and at a post-indictment lineup. *United States* v. *Wade*, 388 U.S. 218 (1967).

In the present case, the Ninth Circuit held that the right to counsel attached when a federal prisoner is held in isolation in administrative detention for more than ninety days pending investigation and trial for the commission of a crime while in prison. The Government argues that the opinion of the Ninth Circuit is in conflict with *Kirby* v. *Illinois*, 406 U.S. 682 (1972). This Court stated in *Kirby* in a plurality opinion, that the Sixth Amendment right to counsel "attaches only at or after the time that adversary judicial proceedings have been initiated" against an accused. *Kirby* v. *Illinois*, *supra*, at 688. Thus, in *Kirby*, this Court held that the right to counsel does not attach to out-of-court eyewitness identification procedures conducted prior to indictment. The Ninth Circuit correctly noted that *Kirby* is dis-

tinguishable from this case because *Kirby* was not a prison case.[10]

The Respondent's right to counsel issue does not arise in the context of a pre-indictment lineup. Indeed, eyewitness identification has nothing to do with this case. The Respondent Ramirez and his three co-defendants were deprived of their right to counsel for twenty months while they were placed in solitary confinement as suspects in a prison murder.

This occurred while the Government conducted its investigation into the case with the help of the Federal

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[10] When *Kirby* v. *Illinois*, 406 U.S. 682 (1972) was decided by this Court, it was at odds with numerous lower court of appeal decisions that held that the right to counsel attached at pre-indictment lineups. See, *Wilson* v. *Gaffney*, 454 F. 2d 142, 144 (10th Cir. 1972); *United States* v. *Greene*, 429 F.2d 193, 196 (D.C. Cir. 1970); *United States* v. *Phillips*, 427 F.2d 1035, 1037 (9th Cir. 1970). The *Kirby* decision was thereafter subjected to criticism in the legal periodicals. See, Comment, *Kirby* v. *Illinois: A New Approach to the Right to Counsel*, 58 Iowa L.Rev. 404, 416 (1972) ("the result in *Kirby* was reached because of an unnecessary narrow reading of *Wade* and the Sixth Amendment."); Note, *The Lineup's Lament: Kirby* v. *Illinois*, 22 De Paul L.Rev. 660, 675 (1973) ("By drawing a line between post- and pre-indictment lineups, the Court exalts form over substance."); Note, *Right to Counsel at Lineups—A Pro Forma Right*, 7 Suffolk Univ.L.Rev. 587, 606 (1973) ("the reasons given by the *Wade* Court for the importance of counsel's presence at the lineup apply whether the confrontation occurs before or after indictment."); Pulaski, *Neil* v. *Biggers: The Supreme Court Dismantles The Wade Trilogy's Due Process Protection*, 26 Stan.L.Rev. 1097, 1102 (1974). Furthermore, several states have declined to follow *Kirby* and have extended the right to counsel to pre-indictment lineups on the basis of state constitutional grounds. See, *People* v. *Bustamante*, 30 Cal. 3d 88; 177 Cal.Rptr. 576; 634 P.2d 927 (1981); *Blue* v. *State*, 558 P. 2d 636, 641 (Alaska 1977); *People* v. *Jackson*, 391 Mich. 323; 217 N.W. 2d 22 (1974); *Commonwealth* v. *Richman*, 458 Pa. 167; 320 A. 2d 351 (1974).

Bureau of Investigation. Since Respondent was serving a federal prison sentence for bank robbery, within a month after the murder, the prison held a prison disciplinary hearing at which the Respondent was found guilty of the murder. His punishment was loss of good time sentence credits and placement in solitary confinement. At the hearing, however, the Respondent asked for the assistance of an attorney (J.A. 32-33). Since the Respondent was indigent, he was unable to privately retain an attorney and no attorney was provided for the Respondent until he was indicted twenty months later.

Providing an attorney for the first time at the post-indictment arraignment was not sufficient under the facts of this case to insure that Respondent was afforded his constitutional right to counsel. The Ninth Circuit, in reaching that conclusion, essentially relied upon the earlier decisions of this Court. See, *Powell* v. *Alabama*, 287 U.S. 45 (1932); *United States* v. *Wade*, 388 U.S. 218 (1967); *Escobedo* v. *Illinois*, 378 U.S. 478 (1964).

From *Powell* v. *Alabama*, *supra*, it is clear that the right to assigned counsel "is not discharged by an assignment at such time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case." (287 U.S., at 71) Thus, in *Powell*, the defendants' convictions were reversed because counsel was appointed only one day before the trial in a capital case. The right to counsel was not protected if counsel was appointed at a time period where it was impossible to conduct pre-trial preparation in the case. In the same manner, by delaying the appointment of counsel in Repondent's case for twenty months, the appointment of counsel was made in a manner which precluded effective aid in preparation and trial of the case.

In *United States* v. *Ash*, 413 U.S. 300, 310 (1973), this Court noted that the "extension of the right to counsel to events before trial has resulted from changing patterns of criminal procedure and investigation that have tended to generate pre-trial events that might appropriately be considered to be parts of the trial itself." These pre-trial events where the right to counsel attached were called critical stages in the proceedings in *United States* v. *Wade*, 388 U.S. 218 (1967). Thus, in *Wade*, this Court stated:

> When the Bill of Rights was adopted, there were no organized police forces as we know them today. The accused confronted the prosecutor and the witnesses against him, and the evidence was marshalled, largely at the trial itself. In contrast, today's law enforcement machinery involves critical confrontations of the accused by the prosecution at pretrial proceedings where the results might well settle the accused's fate and reduce the trial itself to a mere formality. In recognition of these realities of modern criminal prosecution, our cases have construed the Sixth Amendment guarantee to apply to "critical" stages of the proceedings. (388 U.S., at 224)

In *United States* v. *Wade*, *supra*, this Court extended the Sixth Amendment right to counsel to a pre-trial lineup, denominating that event as a critical stage of the proceeding. The Court noted that a pre-trial proceeding is a "critical stage" if "the presence of . . . counsel is necessary to preserve the defendant's . . . right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself." (388 U.S., at 277)

In the *Wade* case, this Court focused upon two problems in extending the right to counsel: the danger that suggestion, intentional or unconscious, will influence the witness' identification; and the difficulty in reconstruct-

ing the manner and mode of lineup identification at trial, so that defense counsel would be unable to cross-examine the witness on that subject. These problems led the Court to conclude that "there can be little doubt that for Wade the post-indictment lineup was a critical stage of the prosecution at which he was 'as much entitled to such aid [of counsel] . . . as at the trial itself.' (*Powell* v. *Alabama*, 287 U.S. 45, 57)." (388 U.S., at 236-237)[11]

Thus, from the *Wade* case, it is clear that if Respondent's right to meaningful confrontation and to the effective assistance of counsel at trial was substantially jeopardized by a twenty month pre-indictment delay and placement in solitary confinement, then his right to counsel was violated. This is so whether the Court uses the phrase "the right to counsel attaches" during prolonged administrative detention or whether the Court states that such prolonged detention "impairs the accused's right to meaningful confrontation and his right to the effective assistance of counsel at trial."

Although the *Kirby* decision does appear to limit the right to counsel to the post-indictment stage, a different rule must be applied to cases involving prison crimes, such as occurred in this case. In *Escobedo* v. *Illinois*, 378 U.S. 478 (1964), and *Miranda* v. *Arizona*, 384 U.S. 436

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[11] This was further explained in Justice Stewart's concurring opinion in *United States* v. *Ash*, 413 U.S. 300, 324 n.1 (1973), where it states:

> I do not read *Wade* as requiring counsel because a lineup is a "trial-type" situation, nor do I understand that the Court required the presence of an attorney because of the advice or assistance he could give to his client at the lineup itself. Rather, I had thought the reasoning of *Wade* was that the right to counsel is essentially a protection for the defendant at trial, and that counsel is necessary at a lineup in order to ensure a meaningful confrontation and the effective assistance of counsel at trial.

(1966), this Court extended the right to counsel to the post-arrest interrogation of an accused by the police, even though such interrogation occurred prior to the indictment.

In *Escobedo* v. *Illinois*, *supra*, the defendant was convicted of murdering his brother-in-law. On the night of the murder he was arrested and interrogated at a police station. While at the police station he made several requests to see his lawyer, who, though present in the building, was refused access to his client. The defendant was not advised by the police of his right to remain silent and made damaging statements after repeated questioning by the police. The conviction was reversed by this Court on Sixth Amendment right to counsel grounds, in an opinion which stated:

> We hold, therefore, that where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied "the Assistance of Counsel" in violation of the Sixth Amendment to the Constitution as "made obligatory upon the States by the Fourteenth Amendment," *Gideon* v. *Wainwright*, 372 U.S., at 342, and that no statement elicited by the police during the interrogation may be used against him at a criminal trial. (378 U.S., at 490-491)

The Government has argued that *Miranda* and *Escobedo* were not intended to vindicate the Sixth Amendment right to counsel but rather were intended to insure the full effectuation of the Fifth Amendment privi-

lege against compulsory self-incrimination, citing *Johnson* v. *New Jersey*, 384 U.S. 719 (1966) and *Kirby* v. *Illinois*, 406 U.S. 682 (1972). However, *Johnson* v. *New Jersey*, *supra*, merely decided the issue of whether *Miranda* and *Escobedo* were retroactive, and nothing more. *Kirby* v. *Illinois*, *supra*, did not overrule *Escobedo*. Rather, *Kirby* notes that *Escobedo* is the one case where the Sixth Amendment right to counsel did attach prior to indictment. Nowhere is it ever suggested that *Escobedo* should be overruled. On the contrary, this Court has been careful to protect the accused's Sixth Amendment right to counsel in interrogation situations, although admittedly recent cases have all involved post-indictment situations. See, *Estelle* v. *Smith*, 451 U.S. 454 (1981); *United States* v. *Henry*, 447 U.S. 264 (1980). See also, *Moore* v. *Illinois*, 434 U.S. 220 (1977)

A critical stage in the prosecution was reached in the present case when Respondent was placed in solitary confinement, deprived of counsel, and excluded from participation in the investigation into the prison homicide in which he was a suspect. Respondent's placement into solitary confinement was the first step in the prosecution by the Government of its case against the Respondents and his co-defendants. The Government's argument that the administrative detention of a prisoner who is a suspect in a prison crime is not accusatory, is an argument that ignores the reality of what occurred in this case. The placement of the Respondent in solitary confinement was not merely a security measure. If it was only a security measure, there would have been no criminal prosecution. Here, there was such a prosecution.

The Government argues that administrative detention should not be viewed as a formal accusation which generates a Sixth Amendment right to counsel, because there

are other reasons for administrative detention. See, 28 C.F.R. 541.22(a).[12] However, in this case, the primary reason Respondent was placed in administrative detention was because he was pending investigation and trial for a criminal act. Furthermore, he remained there for twenty months. Thus, it is under these circumstances that the Ninth Circuit held that Respondent became an accused entitled to a Sixth Amendment right to counsel.

Reliance upon *United States* v. *Marion*, 404 U.S. 307 (1971), a speedy trial case, by the Ninth Circuit was in the nature of an analogy. In *Marion*, this Court stated that "the Sixth Amendment speedy trial provision has no application until the punitive defendant in some way becomes an 'accused'." (404 U.S. at 313) One may be an accused even before he is indicted if he has been arrested

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[12] Section 541.22(a) provides, in part:

The Warden may place an inmate in administrative detention when the inmate is in holdover status (i.e., en route to a designated institution) during transfer, or is a new commitment pending classification. The Warden may also place an inmate in administrative detention when the inmate's continued presence in the general population poses a serious threat to life, property, self, staff, other inmates or to the security or orderly running of the institution and when the inmate:

(1) Is pending a hearing for a violation of Bureau regulations;

(2) Is pending an investigation of a violation of Bureau regulations;

(3) Is pending investigation or trial for a criminal act;

(4) Is pending transfer;

(5) Requests admission to administrative detention for the inmate's own protection, or staff determines that admission to or continuation in administrative detention is necessary for the inmate's own protection (See 541.23); or

(6) Is terminating confinement in disciplinary segregation and placement in general population is not prudent.

and held to answer. This was made clear in *United States* v. *Marion*, 404 U.S. 307, 320-321 (1971) when the Court held:

> So viewed, it is readily understandable that it is either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge that engage the particular protections of the speedy trial provision of the Sixth Amendment.
>
> Invocation of the speedy trial provision thus need not await indictment, information, or other formal charge. But we decline to extend the reach of the amendment to the period prior to arrest. Until this event occurs, a citizen suffers no restraints on his liberty and is not the subject of public accusation: his situation does not compare with that of a defendant who has been arrested and held to answer. (Id., at 320-321)

The analogy to Respondent's case is simply the recognition that when the Respondent was placed in administrative detention and was told at an administrative hearing that he was guilty of murder, he became an accused. This occurred within one week after first being placed in administrative detention. Thereafter, when his confinement in administrative detention became unreasonably long, he was entitled under the Sixth Amendment to either (1) a release from administrative detention, or (2) to the appointment of counsel, or (3) to a speedy indictment and prosecution on the charge of murder.

In order to avoid their Sixth Amendment obligations, the Government argues that the placement of Respondent in solitary confinement for twenty months had little effect on Respondent's right or ability to investigate and prepare his defense to the murder charge. The Government implies that there was little difference between being in solitary confinement rather than the general

population, presumably because prison crimes are inevitably more difficult to investigate than nonprison crimes.

The major harm, however, was the elementary unfairness in allowing the FBI to thoroughly investigate and interview potential witnesses, while at the same time, the Government denies the Respondent a similar access to potential witnesses, to investigate and to prepare his defense. Once again, the time period is important. This occurred over a twenty-month period. Placing Respondent in solitary confinement without counsel removed Respondent from access to all of the witnesses. This was a substantial burden to be placed upon an accused inmate who seeks only the right and opportunity to prepare his defense.

The Government raises several reasons in order to justify this unfairness. None of these reasons survive close analysis. It is suggested that there is little basis in any criminal case for supposing that suspects ordinarily attempt their own preindictment investigations. Respondent's case, however, is different. Just nine days after being placed in solitary confinement, Respondent was told by prison officials at his administrative hearing that he was guilty of murdering Thomas Trejo. Under these circumstances, preindictment investigation by the defense would certainly have occurred.

It is also suggested that Respondent could have used a prison staff member who was available at the prison disciplinary hearings. However, a prison staff member is not a lawyer or a trained investigator. There is no attorney-client privilege affording the prisoner confidentiality. Rather, the staff member is an employee of the very same prison system which seeks to prosecute him at the disciplinary hearing. It is simply unacceptable

to think that a prison staff member could somehow substitute for the "guiding hand of counsel" envisioned in *Powell* v. *Alabama*, 287 U.S. 45, 69 (1932). On the contrary, several prison staff members testified as Government witnesses during the trial because they acted as criminal investigators for the prosecution. For example, it was a prison staff member who secured the crime scene. And another staff member located the murder weapons which had been discarded after the murder.

Equally unacceptable is the Government's suggestion that Respondent could have cleared himself and preserved the names of witnesses by providing full information concerning his activities to the FBI. The Respondent, however, had an absolute Fifth Amendment privilege to remain silent rather than to submit to custodial interrogation by the FBI. *Miranda* v. *Arizona*, 384 U.S. 436 (1966). In *Miranda*, this Court noted that "Custodial interrogation . . . does not necessarily afford the innocent an opportunity to clear themselves." (384 U.S. at 482). And in *Escobedo* v. *Illinois*, 378 U.S. 478, 488 (1963), this Court quoted from an earlier decision where it was noted that "any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances." (378 U.S., at 488) This Court should, therefore, reject the argument that Respondent must give up his Fifth Amendment right as a condition of being afforded an opportunity to investigate and prepare his defense.

The Government has also suggested that Respondent, in solitary confinement, had access to the prison grapevine in order to investigate the case, because there was evidence of conversations between inmates in administrative detention and those in the general population through windows or vents. However, this assumes that

all potential defense witnesses will somehow seek out the Respondent and attempt to communicate with him in violation of prison regulations.[13] That assumption is unrealistic.

Lastly, the Government calls into question the legitimacy of any investigation conducted by an inmate-suspect, stating that it may take the form of intimidating witnesses and suborning perjury. In the next paragraph, the Government suggests that the numerous deceased and missing witnesses were simply invented by the Respondents.[14] While recognizing that those possibilities

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[13] The Government additionally notes that Respondent was not placed in administrative detention until December 4, 1978, three weeks after the murder of Trejo and there is no indication that Respondent took advantage of this three-week period to investigate and prepare a defense. However, prior to December 4, 1978, Respondent was not accused of the murder of Thomas Trejo and would have no reason to investigate or prepare a defense.

The Government also states that there is no need to investigate if an inmate asserting an alibi already knows who he was with at the time of the crime. But in this case, Respondent only knew some inmates by nicknames and he desired to investigate whether other persons in the gymnasium saw him there during the critical time period, even if he did not see them.

Although defense counsel were provided with inmate rosters, photographs of all inmates at Lompoc Prison during November of 1978 were never provided. But even more important was the fact that the inmate rosters were two years old when examined by defense counsel. By then, inmates had died or had been released from custody, and those who were still in prison would be interviewed for the first time by a defense representative two years after the event. Two years later, the witnesses could not remember critical facts. These failures of recollection inevitably decreased their value as defense witnesses.

[14] By extending the Government's logic, it could be said that in any criminal case it is unnecessary to allow the accused an opportunity to

exist, it still does not justify removing the inmate-suspect from any opportunity to conduct an investigation. That is what occurred in this case. Indeed, the Ninth Circuit's remedy of appointing counsel would seem to minimize the danger of intimidation and subornation.

Although there is presently no statutory authority for the appointment of counsel, this should not be a factor in determining whether the Sixth Amendment right to counsel exists in the first instance. Indeed, the wholesale appointment of counsel for inmate suspects in administrative detention may not be the Government's response at all.

The case of *Miranda* v. *Arizona*, 384 U.S. 436 (1966) did not result in the placement of lawyers at police stations for the purpose of being appointed to represent suspects during custodial interrogation. It resulted in the termination of all police interrogation when the suspect, after being informed of his right to counsel, requested counsel to be present at the interrogation.

In the same manner, the Ninth Circuit's opinion in the *Gouveia* case will not result in the placement of lawyers in the prisons to assist the prisoners in the investigation of their cases. It will, however, result in the Government avoiding in the future those situations in which a prisoner is placed in solitary confinement for twenty months prior to indictment without the assistance of counsel during that time.

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testify in his own defense, because it would be a simple matter for him to invent a defense. Yet this Court has stated unequivocally that "Few rights are more fundamental than that of an accused to present witnesses in his own defense." *Chambers* v. *Mississippi*, 410 U.S. 284, 302 (1973)

Although the Ninth Circuit's opinion in this case focuses upon the right to counsel, it also rests in part upon the fact that the Government unnecessarily delayed bringing the indictment in this case. During that period of delay, the Government slowly investigated and prepared its case, while the Respondent was kept in isolation away from the assistance of counsel. After the passage of twenty months, when counsel was finally appointed to represent the Respondent, the case was finally appointed to represent the Respondent, the case had become so old that Respondent's constitutional right to the effective assistance of counsel was infringed upon. Thus, the Ninth Circuit's opinion is designed to prevent, in the future, long delays in the initiation of criminal charges in cases involving prison crimes. The ultimate effect, of course, is to protect the accused's right to counsel, recognizing the fact that counsel's effectiveness can best be assured by his early entry into the case on behalf of the accused.

II

The Dismissal Of The Indictment Was An Appropriate Remedy In This Case For Violation Of The Sixth Amendment Right To Counsel

The Government has also argued that dismissal of the indictment was not the appropriate remedy in this case, even assuming that a violation of the right to counsel has occurred. The Government relies upon this Court's recent opinion in *United States* v. *Morrison*, 449 U.S. 361 (1981).

In *Morrison*, this Court held that dismissal of an indictment because of a violation of the Sixth Amendment right to counsel is not an appropriate remedy unless there is some showing of an adverse consequence to the represen-

tation of the accused or to the fairness of the proceeding leading to conviction. In *Morrison*, this Court found that no prejudice occurred when the accused was visited by Government agents in the absence of her counsel. Thus, dismissal of the indictment was not appropriate under the facts of the *Morrison* case.

However, the Court's opinion in *Morrison* did not reject the remedy of dismissal in the appropriate case. This Court stated that "Our approach has thus been to identify and then neutralize the taint by tailoring relief appropriate in the circumstances to assure the defendant the effective assistance of counsel and a fair trial." *United States* v. *Morrison*, 449 U.S. 361, 365 (1981).

In some cases, the appropriate remedy is to reverse the conviction and order a new trial at which evidence obtained in violation of the right to counsel is suppressed. See, *Massiah* v. *United States*, 377 U.S. 201 (1964); *United States* v. *Wade*, 388 U.S. 218 (1967); *United States* v. *Blue*, 384 U.S. 251 (1966). But where there is a continuing prejudice which cannot be remedied by a new trial or suppression of evidence, this Court has recognized that dismissal of the indictment is the appropriate remedy. *United States* v. *Morrison*, *supra*, at 366 n.2, citing *United States* v. *Marion*, 404 U.S. 307, 325-326 (1971). In the Court's own words, what must be shown is "demonstrable prejudice, or substantial threat thereof." *United States* v. *Morrison*, *supra*, at 365.

In the Respondent's case, the Ninth Circuit found a substantial threat of prejudice by the twenty-month delay in providing the Respondent counsel. The Court stated:

> The "taint" in the present case is that lengthy preindictment isolation without the assistance of counsel handicapped appellants' ability to defend

> themselves at trial. Prison crimes present suspects with unique investigatory and evidentiary obstacles. And, to repeat, the passage of time greatly exacerbates these difficulties. The length of delay in appointing counsel for appellants who were likewise denied the opportunity to take measures to preserve their own defense means that the critical initial stage of investigation was forever lost to appellants. *United States* v. *Gouveia*, 704 F. 2d 1116, 1125.

The Ninth Circuit also found demonstrable prejudice. Indeed, the instant case is one where there is a continuing prejudice that cannot be remedied by mere reversal of the conviction or suppression of evidence. Each of the Respondents were unable to locate defense witnesses because the witnesses, many known only by nicknames, were transferred to other institutions, released from custody, or died before the Respondents were indicted and afforded counsel. The Government's delay in indicting the Respondents infringed upon their right to counsel because of counsel's inability to locate and present these defense witnesses. Because the blame is properly placed upon the Government for this infringement of the right to counsel and because it affects the fairness of the proceeding which led to the convictions, dismissal of the indictment is the appropriate remedy in this case.

Petitioner's demand for a more specific inquiry into actual prejudice is misplaced in the context of this case. It should be noted that the present case involves a situation wherein counsel was prevented from discharging his normal functions by governmental actions. More specifically, the Government failed to appoint counsel at a time when counsel could effectively discharge his normal functions.

In the case of *Cooper* v. *Fitzharris*, 586 F. 2d 1325 (9th Cir. 1978), the Ninth Circuit distinguished, in the harmless error context, those cases in which prejudice must be

shown in some specific fashion from those in which no specific showing of prejudice is required when an ineffective assistance of counsel claim is made. The Ninth Circuit indicated that:

> When no counsel is provided, or counsel is prevented from discharging his normal functions, the evil lies in what the attorney does not do, and is either not readily apparent on the record, or occurs at a time when no record is made. "Thus an inquiry into a claim of harmless error here would require, unlike most cases, unguided speculation," [citation] and a rule requiring that the record reflect that the defendant was "prejudiced . . . in some specific fashion would not be susceptible to intelligent, even-handed application." [citation] This situation is to be distinguished from the usual one in which a harmless error rule is applied: "In the normal case where a harmless error rule is applied, the error occurs at trial and its scope is readily identifiable. Accordingly, the reviewing court can undertake with some confidence its relatively narrow task of assessing the likelihood that the error materially affected the deliberations of the jury." (586 F. 2d at 1332)

Thus, when the Ninth Circuit found a presumption of prejudice in the Respondent's case, it was merely recognizing that under certain circumstances, a violation of the Sixth Amendment right to counsel is prejudicial per se. This occurs where there is no counsel provided, as in *Gideon* v. *Wainwright*, 372 U.S. 335 (1963) or where counsel is prevented from discharging functions vital to effective representation of his client. See, *Geders* v. *United States*, 425 U.S. 80 (1976) (counsel prevented from conferring with client during mid-trial recess); *Herring* v. *New York*, 422 U.S. 853 (1975) (counsel not permitted to give summation); *Holloway* v. *Arkansas*, 435 U.S. 475 (1978) (counsel had conflict of interest); *Powell* v. *Alabama*, 387 U.S. 45 (1932) (counsel appointed too late to prepare for trial).

Thus, in *Hamilton* v. *Alabama*, 368 U.S. 52, 55 (1961), this Court stated that "When one pleads to a capital charge without benefit of counsel, we do not stop to determine whether prejudice resulted." And in *White* v. *Maryland*, 373 U.S. 59, 60 (1963), this Court stated that "the rationale of *Hamilton* v. *Alabama*, *supra*, does not rest, as we shall see, on a showing of prejudice." It was this same type of consideration which led the Ninth Circuit to find a presumption of prejudice under the facts of the Respondent's case. By delaying the appointment of counsel for almost two years, the Government prevented counsel from discharging functions vital to the effective representation of the Respondent.

The Government's reliance upon *United States* v. *Valenzuela-Bernal*, No. 81-450 (July 2, 1982) is misplaced. This Court's decision in *Valenzuela-Bernal* was concerned with the dismissal remedy in the context of the Compulsory Process Clause of the Sixth Amendment and the Due Process Clause of the Fifth Amendment. In that case, the Government deported two of three illegal alien material witnesses, who were passengers in a vehicle in which the defendant had been arrested. This Court held that absent some showing that the testimony of the missing witnesses would be both material and favorable to the defendant, the indictment should not be dismissed.

The *Valenzuela-Bernal* case is distinguishable from Respondent's case on several grounds. The Respondent's case involves the Sixth Amendment right to counsel, not the Compulsory Process Clause. In *Valenzuela-Bernal*, the Court was also especially concerned with the Government's vital interest in regulating immigration, a consideration absent in Respondent's case. And, finally, no effort was made in *Valenzuela-Bernal* by the defendant to explain how the deported passengers could assist him

in proving his innocence. In Respondent's case, on the other hand, the showing was made that the missing witnesses were alibi witnesses who would testify that the Respondent was at another location at the time of the killing.

Although it is true that Respondent was able to produce some, but not all of his alibi witnesses, his failure to produce all of such witnesses was caused by the Government's failure to provide counsel. And finally, as the Ninth Circuit's opinion points out, it is not the quantity of defense witnesses that is important, it is their quality. *United States* v. *Gouveia*, 704 F. 2d 1116, 1326 (9th Cir. 1983). The fact that some alibi witnesses testified does not cure the "other prejudicial factors such as the dimming memories of witnesses whose testimony the defense had no opportunity to record at a time when events were fresh and the deterioration of physical evidence." (*Id.*, at 1326) Therefore, dismissal of the indictment in Respondent's case was the appropriate remedy.

CONCLUSION

Based upon the foregoing, Respondent urges the Court to reverse the convictions and to order the indictment dismissed.

Respectfully submitted,

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